

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

**Federal Trade Commission**

**Plaintiff,**

**v.**

**Innovative Marketing, Inc., et al.**

**Defendants,**

**AND**

**Maurice D'Souza**

**Relief Defendant.**

**CIVIL NO. RDB 08-CV-3233**

**PLAINTIFF'S MOTION FOR LEAVE TO FILE A SURREPLY IN RESPONSE TO  
DEFENDANTS' REPLY TO THE FTC'S OPPOSITION TO THE MOTION TO DISMISS AND  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Plaintiff Federal Trade Commission ("FTC" or "Commission"), hereby requests leave to file a surreply in response to Sam Jain and Kristy Ross's reply brief filed in response to the FTC's opposition to the pending motion to dismiss. In support of its motion, the Commission states as follows:

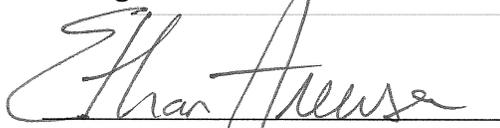
1. On March 5, 2009, defendants Sam Jain and Kristy Ross filed a reply brief in response to the FTC's opposition to the pending motion to dismiss (the "Reply Brief").
2. In their Reply Brief, Jain and Ross cite a single sentence from a now defunct State Department webpage as evidence that all service of process in Belize must be made through Belize's central authority. Based solely on this sentence, defendants argue that the FTC's efforts to serve defendant Innovative Marketing, Inc. have failed, and as a result this entire case must be dismissed.

3. The FTC has consulted with the State Department, which has searched its records and provided the FTC with guidance on service of process in Belize. This guidance directly contradicts the defendants' argument.
4. To correct the record, and to provide this Court with evidence – as opposed to the conjecture offered by the defendants – as to the law of service in Belize, the FTC hereby seeks leave to file the attached surreply.

Dated: March 23, 2009

Respectfully submitted:

DAVID SHONKA  
Acting General Counsel

A handwritten signature in black ink, appearing to read "Ethan Arenson", is written over a horizontal line.

Ethan Arenson, DC # 473296 (earenson@ftc.gov)  
Colleen B. Robbins, NY# 2882710 (crobbins@ftc.gov)  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Room 288  
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UNITED STATES DISTRICT COURT  
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**Relief Defendant.**

**CIVIL NO. RDB 08-CV-3233**

**ORDER GRANTING THE FTC LEAVE TO FILE A SURREPLY**

Upon consideration of the FTC's Motion for Leave to File a Surreply in Response to Defendants' Reply to the FTC's Opposition to the Motion to Dismiss, it is this \_\_\_\_ day of \_\_\_\_\_, 2009

**ORDERED** that FTC's Motion to File a Surreply is hereby GRANTED.

\_\_\_\_\_  
Richard D. Bennett  
United States District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2009, I caused a true and correct copy of the foregoing, together with all attachments, to be served via the Court's electronic filing system upon:

Tom Kirsh  
Winston & Strawn  
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60601-9703  
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*Counsel for James Reno and ByteHosting Internet Services LLC*

  
Ethan Arenson

UNITED STATES DISTRICT COURT  
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**CIVIL NO. RDB 08-CV-3233**

**PLAINTIFF'S SURREPLY IN RESPONSE TO DEFENDANTS'  
REPLY TO THE FTC'S OPPOSITION TO THE MOTION TO DISMISS**

Sam Jain and Kristy Ross's Reply Brief to the FTC's opposition to the pending motion to dismiss contains significant errors of both fact and law. To correct the record, and put to rest the defendants' frivolous motion to dismiss, the FTC hereby files the following surreply:

**I. Argument**

Defendants have moved to dismiss this case on the grounds that defendant Innovative Marketing, Inc. ("IMI") – the corporation they control – is a necessary party to this litigation that has not been properly served. Although the FTC has now served IMI twice<sup>1</sup>, the defendants continue to

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<sup>1</sup>Defendants continue to challenge the FTC's service upon Jack Palladino, who accepted service on behalf of IMI, signed a lease as a guarantor for IMI, and specifically told the FTC's process server that he was expecting the FTC's Complaint and had "a lot of reading to do," but now claims not to have been authorized by IMI to accept service. Palladino's testimony simply is not credible, while there is no reason to doubt the sworn testimony of the FTC's process server. Unless defendants can produce a control person from IMI to testify that Palladino lied about

challenge the validity of the FTC's service upon IMI in a transparent effort to further delay this litigation. This Court should reject the defendants' dilatory tactics and deny their motion to dismiss.

**A. The Commission Has Properly Served IMI**

Defendants contend that the FTC's use of a private law firm in Belize to personally serve IMI's registered agent in that country is not valid because Belize and the United States are parties to an agreement that requires all service of process in Belize to be sent exclusively to Belize's central authority. The sole authority cited by the defendants for the existence of this purported agreement is a single sentence from a now defunct State Department webpage. This sentence indicated that "authorities" from the government of Belize have advised the "US Embassy" that the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the "Hague Service Convention")<sup>2</sup> applies in Belize and that "requests for service should be sent to the following central authority." From this sentence, defendants leap to the conclusion that service via the central authority in Belize is the *only* acceptable means of service in Belize.

The defendants' decision to base their argument entirely on a single sentence on a now defunct State Department webpage is curious given that, even when the page was active, it contained an explicit disclaimer cautioning readers that the information provided "may not be totally accurate" and should be used for "general information only." See <http://web.archive.org/web/20080212013227/http://>

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being authorized to accept service, their argument that Palladino was not acting as an agent of IMI when he accepted service on its behalf should be rejected.

<sup>2</sup>Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the "Hague Service Convention"), 20 U.S.T. 361; 658 U.N.T.S. 163, T.I.A.S. No. 6638; 28 U.S.C.A. (Appendix following Fed. R. Civ. Pro. 4). See Hague Conference on Private International Law, available online at <http://www.hcch.net>.

travel.state.gov/law/info/judicial/judicial\_686.html (an archived version of the now defunct webpage cited by defendants).<sup>3</sup> Had the defendants taken the next step, and actually consulted the State Department, they would have learned that their conclusions about the laws of service in Belize are mistaken, and that the FTC's use of a private process server constitutes valid service on IMI.

1. The Hague Service Convention Applies Between the United States and Belize As It Did In 1981

In order to provide this Court with evidence, as opposed to the conjecture offered by the defendants, the FTC consulted the State Department's Office of Treaty Affairs for its official position on Belize's status under the Hague Service Convention. In response to the FTC's request, the State Department reviewed its treaty file for Belize and determined that on September 29, 1982, newly independent Belize contacted the Secretary General of the United Nations and informed the U.N. that "the Government of Belize has decided to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize." A copy of the September 29, 1982 letter, along with a declaration from the State Department's Avril D. Haines authenticating the letter, is attached to the FTC's Motion to File a Surreply as Exhibit 3.

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<sup>3</sup>As established in the attached declaration of the State Department's Edward A. Betancourt, the webpage cited by the defendants was removed from the State Department's website because it contained inaccurate and out of date information. See Decl. Of Edward A. Betancourt, attached to the FTC's Motion to File a Surreply as Exhibit 2 at ¶¶ 1-4.

Ms. Haines' declaration also confirms that the State Department's Office of Treaty Affairs has no record of a subsequent communication from Belize altering the instructions in the 1982 letter as they apply to the Hague Service Convention.<sup>4</sup> See Haines Decl. at ¶ 4. Accordingly, it is the view of the State Department that the Hague Service Convention applies between the United States and Belize "as it applied between British Honduras and the United States prior to Belize's independence in 1981." See Haines Decl. at ¶ 5.

2. Under the Applicable Provisions of the Hague Service Convention, the FTC's Service Upon IMI Was Proper

In light of the State Department's conclusion, the sole question for this Court is whether service by private process server was a valid means of service under the Hague Service Convention as the Convention applied in British Honduras<sup>5</sup> (now Belize) prior to Belize's independence.<sup>6</sup> As established

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<sup>4</sup>The source of the guidance cited by the defendants on the defunct State Department website ("requests for service should be sent to the following central authority") is unclear. Assuming the information is accurate, it likely refers to the instructions to be followed if a litigant makes a "request for service" of the Belize government, as opposed to using the other methods prescribed by the Hague Service Convention. This view is consistent with the language used on the same webpage with respect to Canada. In the Canadian paragraph, the webpage similarly advises that "requests should be forwarded directly to the Central Authority of the [Canadian] province or territory concerned." See [http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial_686.html) However, as in Belize, service via the central authority is but one of many options for litigants seeking to serve process in Canada. See "Declarations," available online at [http://www.hcch.net/index\\_en.php?act=status.comment&csid=392&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=392&disp=resdn)

<sup>5</sup>British Honduras changed its name to Belize in 1973 and gained its independence on September 21, 1981. See [http://www.governmentofbelize.gov.bz/ab\\_history.html](http://www.governmentofbelize.gov.bz/ab_history.html).

<sup>6</sup>Given the State Department's view, it appears that the Hague Service Convention as it applies between Belize and the United States constitutes an "internationally agreed means of service" under Rule 4(f)(1). But see [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17) (Belize not listed as a Contracting State to the Hague Service Convention on the official Hague Conference website). But even if this Court were to conclude otherwise, and hold that no

below, the answer to this question is unambiguously yes.

In order to reach this conclusion, the FTC first confirmed that the Hague Service Convention applied in Belize before its independence. This fact is confirmed by the Hague Conference on Private International Law – the inter-governmental organization responsible for implementation and operation of the Hague Service Convention – which notes that the Convention entered into force in the United Kingdom in 1969 and was extended to its dependency British Honduras (now Belize) in 1970. See “Entry Into Force”, available online at [http://www.hcch.net/index\\_en.php?act=status.comment&csid=902&disp=eif](http://www.hcch.net/index_en.php?act=status.comment&csid=902&disp=eif).

Next, the FTC confirmed that service of process by private process server is permissible in the United Kingdom, and by extension Belize, under the Hague Service Convention as the Convention was adopted by the United Kingdom. Under Article 10 of the Convention, service of process is permitted using a variety of means, including private process server, provided that the country adopting the Convention does not object to such alternative means. In its initial declaration concerning methods of service under Article 10, the United Kingdom stated that documents would be accepted “only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States.” See “Declarations,” available online at [http://www.hcch.net/index\\_en.php?act=status.comment&csid=427&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=427&disp=resdn). The U.K. later clarified this position in a 1980 letter to the Permanent Bureau of the Hague Conference on Private International Law, noting that “our declaration

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“internationally agreed means of service” exists between Belize and the United States, the FTC’s service on IMI would still be valid under Rule 4(f)(2)(A), which permits service pursuant to the foreign country’s law. See FTC’s Opposition to the Defendants’ Motions to Dismiss at 2 n.2 (D.E. 62)

does not preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in the United Kingdom ‘directly’ through a competent person other than a judicial officer or official, e.g., a solicitor (...).” Id. As a result of the 1980 clarification, “direct” service of process via private process server has long been recognized as a valid means of service in the United Kingdom, and by extension, in Belize. Cf. Koehler v. Dodwell, 152 F.3d 304, 307-08 (4th Cir. 1998) (holding that service by private process server is valid in the Bahamas, based on the United Kingdom’s adoption of the Hague Convention on behalf of the Bahamas). See also “Special Consular Services,” available online at [http://london.usembassy.gov/cons\\_new/acs/scs/serving\\_legal\\_papers\\_and\\_process.html](http://london.usembassy.gov/cons_new/acs/scs/serving_legal_papers_and_process.html) (confirming, on the official website of the U.S. Embassy for the United Kingdom, that service of process in the U.K. may be effected through private process server and providing a list of process servers available for hire).

Thus, under the Hague Service Convention as it applies between the United States and Belize, service of process via private process server is a valid means of service in Belize. As a result, the Commission’s use of a private process server to serve IMI constitutes valid service, and the defendants’ motion to dismiss must fail.<sup>7</sup>

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<sup>7</sup>The only other challenge to service raised by the defendants is a formalistic argument about whether the proof of service must be filed with the Court as a separate document, or may be filed as an attachment. Although the FTC is aware of nothing in Rule 4(1) that requires the separate filing that the defendants demand, the FTC will again file the Belizean proof of service to foreclose any additional debate on this topic.

**B. The Defendants' Motion To Dismiss Was Filed Solely as a Delaying Tactic**

With the issue of proper service of IMI now put to rest, the FTC believes it worth pointing out the inherently frivolous nature of defendants' motion to dismiss.

The Federal Rules of Civil Procedure provide for considerable leeway when serving a foreign defendant. The law is clear that the 120 day time limit for service of process provided in Rule 4(m) does not apply to service upon a foreign defendant, and that there is no set time limit under which service upon a foreign defendant must be effected. See Cane Creek Cycling Components, Inc. v. Tien Hsin Indus., No. 1:07cv133, 2007 WL 3028321, at \*2 (W.D.N.C. Oct. 15, 2007) (noting that a "flexible due diligence standard," and not the 120 day limit set in Rule 4(m), applies when serving a defendant in a foreign county.)

Thus, even if the defendants' erroneous conclusion that IMI had not been properly served was correct, there still would have been no basis to dismiss the Commission's Complaint for failure to join an indispensable party. The defendants filed their motion to dismiss 77 days after the Commission's Complaint was filed. Even under the inapplicable 120 day time limit set by Rule 4(m), the Commission still would have had more than six weeks to serve IMI using alternative means of service before dismissal could even have been considered. Due to IMI's foreign status, the actual deadline to serve IMI is considerably longer. See Cane Creek, 2007 WL 3028321 at \*2.

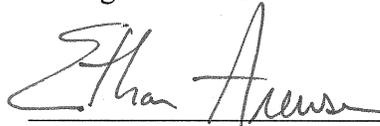
The defendants' decision to file motions to dismiss that could not possibly succeed is a waste of judicial resources and a transparent effort to further delay this matter. The Commission requests that

this Court rule promptly on these pending motions, so this case can move forward.

Dated: March 23, 2009

Respectfully submitted:

DAVID SHONKA  
Acting General Counsel

A handwritten signature in black ink, appearing to read "Ethan Arenson", written over a horizontal line.

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Colleen B. Robbins, NY# 2882710 (crobbins@ftc.gov)  
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(202) 326-3395 FACSIMILE

**CERTIFICATE OF SERVICE**

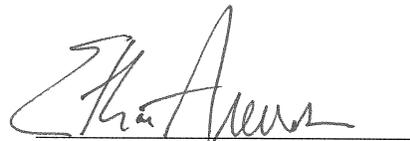
I hereby certify that on March 23, 2009, I caused a true and correct copy of the foregoing, together with all attachments, to be served via the Court's electronic filing system upon:

Tom Kirsh  
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35 W. Wacker Drive  
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60601-9703  
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*Counsel for James Reno and ByteHosting Internet Services LLC*



Ethan Arenson

THE UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

Federal Trade Commission,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil No.: RDB 08-CV-3233
Innovative Marketing, Inc., <i>et al.</i> ,	)	
	)	
Defendants,	)	
	)	
AND	)	
	)	
Maurice D'Souza,	)	
	)	
Relief Defendant.	)	

DECLARATION OF EDWARD A. BETANCOURT

I, Edward A. Betancourt, hereby depose and say as follows:

1. I am the Director of the Office of Policy Review and Inter-Agency Liaison in the Directorate of Overseas Citizens Services ("OCS") of the Bureau of Consular Affairs in the United States Department of State. I make this declaration based on information available to me in my official capacity.
2. OCS is responsible, inter alia, for drafting and updating information concerning international judicial assistance on the Bureau of Consular Affairs website (CA Web).
3. This office drafted the webpage "Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters,"

(TSG Webpage) that was previously accessible on CA Web at [http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://travel.state.gov/law/info/judicial/judicial_686.html). That document contains a disclaimer that the information therein contained "is provided for general information only and may not be accurate in a particular case."

4. The link to the TSG Webpage from CA Web's main judicial assistance portal was deactivated some years ago due to inaccuracies that developed over the passage of time such as changes regarding contact information for foreign Central Authorities. Some links to the TSG Webpage remained on CA Web however and were thus accessible to the public. Upon discovering that those links were still enabled this office directed that the TSG Webpage itself be disabled on March 6, 2009 to effectively remove the inaccurate information from the public information provided by the Bureau of Consular Affairs.
5. I declare under penalty of perjury that the foregoing is true and correct (28 USC 1746).

  
Edward A. Betancourt

Executed in Washington, D.C.

March 23, 2009

THE UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

Federal Trade Commission,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil No.: RDB 08-CV-3233
Innovative Marketing, Inc., <i>et al.</i> ,	)	
	)	
Defendants,	)	
	)	
AND	)	
	)	
Maurice D'Souza,	)	
	)	
Relief Defendant.	)	

DECLARATION OF AVRIL D. HAINES

I, Avril D. Haines, declare and state as follows:

1. I am the Assistant Legal Adviser for Treaty Affairs of the United States Department of State, Washington, D.C. The Office of Treaty Affairs maintains the records and oversees the negotiation, conclusion, congressional reporting, and publication of United States treaties and other international agreements in accordance with the Foreign Affairs Manual, 11 FAM 750, and relevant Department regulations, 22 C.F.R. Part 181.
2. My responsibilities as head of the Department's Office of Treaty Affairs require that I be familiar with the practice of the United States in matters concerning the making,

interpretation, and application of treaties and other international agreements. My responsibilities also include maintaining the official treaty records of the United States.

3. I certify that the document annexed hereto as Attachment A is a true and accurate copy of a communication dated September 29, 1982, to the Secretary-General of the United Nations from the Prime Minister and Minister of Foreign Affairs of Belize concerning treaty succession, a copy of which was forwarded to the United States by the United Nations at the request of the Government of Belize and is maintained in the country files (Belize) of the Office of Treaty Affairs of the U.S. Department of State.

4. Neither the Belize country files nor the files of the Office of Treaty Affairs for the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (“Hague Service Convention”) contain any subsequent communication from the Government of Belize with respect to the September 29, 1982 letter or the Hague Service Convention.

5. It is the position of the Office of Treaty Affairs that the Hague Service Convention applies provisionally and on the basis of reciprocity between Belize and the United States under the same terms as it applied between British Honduras and the United States prior to Belize’s independence in 1981.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Washington, D.C. on March 20, 2009.

A handwritten signature in black ink, appearing to read "Avril D. Haines", written over a horizontal line.

Avril D. Haines  
Assistant Legal Adviser  
for Treaty Affairs

**ATTACHMENT A**

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ENCL. USUN NEW YORK A-508



*Ministry of Foreign Affairs  
Independence Hill  
Belmopan  
Belize, Central America*

FA/A/9/82 (72)

29th September 1982

Secretary General  
United Nations Organization  
New York, N.Y. 10017  
U. S. A.

Dear Excellency,

I have the honour to inform you that the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize.

Such provisional application would subsist until Belize otherwise notifies Your Excellency, the depository (in the case of a multilateral treaty), or the state party (in the case of a bilateral treaty.)

I should be grateful if Your Excellency would arrange for this letter to be circulated to all Member States of the United Nations and Specialised Agencies, as well as to the executive heads of those agencies.

Accept, Excellency, the renewed assurances of my highest consideration.

Sincerely,

GEORGE PRICE  
Prime Minister and  
Minister of Foreign Affairs

cc. Permanent Representative of Belize to the U.N.  
British High Commission  
Attorney General